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Supreme Court of the United States

October Term, 1902.

No. 288 26

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,

vs.

LAURA LOUISE McDADE, LUCY W. McDADE and KINNEY McDADE, Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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IN THE

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BRIEF FOR DEFENDANTS IN ERROR.

THE FACTS.

On August 19, about 1:30 a. m., the deceased, John I. McDade, was killed while in the discharge of his duty as head brakeman on a freight train of plaintiff in error, as said train was passing through Goodwin, Ark., a station on the main line of railroad owned and operated by plaintiff in error.

The evidence clearly conduces to show that the deceased, while sitting on the side of one of the cars in said train, at his post of duty as head brakeman, and in a proper position for receiving and passing signals as the train was running by a station, was knocked off said car by coming

in contact with a large galvanized iron spout attached to and a part of the water tank at Goodwin, Ark., which tank and its appliances were so negligently constructed and maintained as to cause the said spout to hang at such an angle toward the railroad track as to be unnecessarily dangerous to brakemen, whose duties compelled them to be on top of freight trains, especially when passing through stations.

This iron spout was in the nature of a concealed danger, in that it cleared some freight cars and persons on them, but came so close to others, such as furniture cars, as to be within striking distance of a brakeman, who might reasonably be expected at times, in the proper discharge of his duty, to be sitting on the top of such a car and on the side thereof next to this tank, when a train containing such car or cars was passing it going west, for the head brakeman would then be on the same side as the engineer, to whom he had to pass signals, and, therefore, in the best position to do what was expected of him by the company.

Record, pp. 46, 47, 50, 56, 58, 86, 87.

On the night of August 18, about 9:30 o'clock, a freight train consisting of an engine and twenty-seven freight cars, left Memphis, the eastern terminus of the Choctaw, Oklahoma & Guf Railroad. This train was bound for the west.

Record, p. 117.

The crew of the said train consisted of Conductor C. A. Hollowell, Engineer Robert Church, a fireman and two brakemen, namely, the deceased, John I. McDade, as head brakeman, and W. D. Kennedy as rear brakeman.

Record, pp. 39, 82 and 83.

At Forrest City, Ark., which was reached about 12:10 a. m., August 19, the conductor of said train gave the head brakeman (the deceased) orders to be delivered by him to the engineer to go ahead of train No. 3 to Brinkley, the first station west of Goodwin, inasmuch as a passenger train was following close behind said freight train.

Record, pp. 39, 59, 82, 85.

Leaving Forrest City the go-ahead signal was passed. The next station west of Forrest City was Palestine, where

the same signals were passed and the train went through this station without stopping and proceeded at a rapid rate of speed toward Goodwin, Ark., which was the next station. At this latter station, on the north side of the main track, on which this freight train was running, there was a railroad water tank, which will be more particularly described later. When the train approached Goodwin, the engineer blew the whistle at a point between one-fourth and one-half of a mile from this tank. The conductor, who was in the cupola of the caboose, looking west, gave with his lantern the signal to go ahead, which signal was passed by the rear brakeman to the head brakeman (the deceased) and by the latter passed to the engineer, who answered with a short blast of the whistle.

Record, pp. 39, 41, 83, 149, 150, 151.

The train did not check up at all, and when it passed the Goodwin tank the train was running at a speed of between twenty and twenty-five miles an hour.

Record, pp. 85, 150, 152.

At the time that these signals were being given to go through Goodwin without stopping, the deceased, as head brakeman, was sitting on the north edge of a car which was situated in said train at the distance of about eight or ten car lengths from the engine. Kennedy, the rear brakeman, was two or three cars from the caboose, and the conductor, as before stated, was in the cupola of said caboose looking west. The engineer was on the north side; that is, on the right-hand side of his engine as it was going west, and was looking back to get the signals from the head brakeman.

Record, pp. 41, 42, 83, 84, 149-151.

The uncontroverted evidence is, that it was the positive duty of the brakeman to be on top of trains as they were passing through stations, and that it is not only customary for them to sit on top of the car, but that they are supposed to be on the same side with the engineer, to whom the signals are communicated. (Record, pp. 46, 47, 56, 83, 86.)

It is further proved that where there are furniture cars in a train, the brakeman is in a better position to give

signals to the engineer when on one side of said cars, which are higher than the ordinary car and would, if intervening between the brakeman and the engineer, obstruct the view of each, and thus make it more difficult to transmit signals.

Record, pp. 58, 86, 87.

The proof clearly establishes, that at the time these signals were being given, as this train was passing through Goodwin, the deceased was in the most favorable position, to-wit, on top of the car where he could best discharge the duties of head brakeman, and that he did, in fact, pass said signals while in such position and was seen discharging this duty by the rear brakeman, conductor and engineer of said train.

Record, pp. 42, 46, 47, 56, 58, 86, 87, 93, 149, 150 and 151.

The evidence further shows, that on account of the orders which had been given, in view of the fact that a passenger train was following close behind, it was necessary for the head brakeman to be unusually attentive and watchful for signals from the conductor and rear brakeman, so that he might promptly catch any signal which might be given him and pass the same to the engineer.

Record, pp. 59, 60, 82, 83, 85.

When the train reached Brinkley station, nine miles west of Goodwin, the deceased was missed by the rear brakeman and conductor, who thereupon instituted a search for him. They got up on top of the train and found the lantern of deceased near the west end and north side of a furniture car situated in said train about the tenth car from the engine. The lantern was still burning. (Record, p. 93.)

It was right near the hand-hold and in a circular place made in the car for a lantern in order to keep it from falling off. The grab-iron, or hand-hold, was situated five or six inches from the west end of the car, and about twelve inches from the north side of the car, the lantern being just back of this grab-iron.

Record, pp. 40, 47, 93.

The undisputed testimony is that it is customary, when

a train is passing through a station, for the brakeman to sit on the side of the car, where he can best give signals to the engineer, and to sit near this grab-iron, or hand-hold, so that he can hold on to it while giving the signal. (Record, pp. 47, 48.)

The car on which this lantern of deceased was found was Illinois Central furniture car No. 28,149, and the stipulation of counsel contains the following: "The total height of car is either 14 feet or 14 feet 1 inch, that is, the furniture car on which plaintiff was injured." (Record, p. 102.)

It is further stipulated that the eaves of the car were between 13 and 14 feet in height. (Record, p. 183.)

As tending to show that the deceased was sitting on the north side and near the west end of this particular furniture car where his lantern, still burning, was found at Brinkley, when the train passed the Goodwin tank, we refer to the following excerpts from the testimony of the train crew:

Q. "You say, Mr. Hollowell, as the train was pulling into Goodwin going west, on this night at 1:20 a. m., August 19, 1900, you were in the cupola of the caboose looking west, and that the engineer gave the whistle and you gave the signal to go on?"

A. "Yes, sir."

Q. "This signal, you say, was communicated by the rear brakeman to the head brakeman, and by him to the engineer?"

A. "Yes, sir."

Q. "And you personally saw these signals given?"

A. "Yes, sir."

Q. "And the head brakeman, as you stated, was John I. McDade?"

A. "Yes, sir."

Q. "On which side of the car was he sitting?"

A. "On the right-hand side."

Q. "How far was the train from the water tank at Goodwin when this signal was given by Mr. McDade to go ahead?"

A. "Between a fourth and half a mile."

Q. "To the best of your knowledge and belief, from your seeing him give the signals, you think that he was facing north *on this furniture car where his lantern was found at Brinkley?*"

A. "Yes, sir."

See testimony of C. A. Hollowell, Record, pp. 41, 42, 50.

Engineer Robert Church testified as follows:

Q. "Before you got to Goodwin tank, did you receive any signals from Mr. McDade, or from the head brakeman?"

A. "Yes, sir; I received a signal from the caboose and *one from where his lantern was found*—supposed to have been him, and should have been him."

Q. "You received one from the head brakeman, whoever that was?"

A. "Yes, sir."

Q. "You saw the lantern waving from the side of the car?"

A. "Yes, sir; the lamp was not down on the side; it was from the top, the edge."

Q. "The eaves of the car?"

A. "Yes, sir."

Q. "The lantern was really out from the car waving; you could see it?"

A. "Oh, yes; I seen it by leaning out of the side window as usual."

Q. "You saw this lantern being waved by the head brakeman just beyond the edge of the car?"

A. "Yes, sir."

Q. "On the same side you were on?"

A. "Yes, sir."

Record, pp. 149, 150.

The following is an excerpt from the testimony of W. D. Kennedy:

Q. "Now, as to the position of Mr. Hollowell, the conductor, yourself and Mr. McDade, at the time

this go-ahead signal was being given, after the train whistled for Goodwin."

A. "Well, I was in the caboose before we got to Goodwin, and it is customary—well, it is the rule—that we are supposed to be out on top, passing through all stations. Before he whistled I entered the cupola on my side and went out on top and got out on top, and when he whistled I looked back. Hollowell raised his lamp and gave the signal. I raised my lamp and gave the signal and McDade did the same. As soon as that whistle stopped we began to give the signal and then went through Goodwin."

Q. "Were you on the caboose?"

A. "I was about the third car from the caboose."

Q. "Did you see his lantern moving?"

A. "Yes, sir."

Q. "Where was the lantern?"

A. "The lantern seemed to be moving on the side of the car; he seemed to be giving the signals on the side of the car."

Q. "On which side of the car?"

A. "Right-hand side."

Record, pp. 83 and 84.

Four furniture cars of similar size intervened between the car on which the lantern of deceased was found and the engine, and the proof shows, that under these circumstances, the most favorable position for the head brakeman, in order to pass the signals to the engineer is to be on the right-hand side of one of said cars. (Record, pp. 86, 87, 116, 117, 118.)

No other traces of deceased could be found at Brinkley, except his lighted lantern.

The fact that deceased was missing was reported promptly to headquarters, and directions were given to keep a lookout for him. His body was found by the crew of passenger train No. 2, eastward bound, which reached Goodwin at 3:34 a. m., August 19. When first discovered, he was lying on his right side, with his head somewhat resting under his body and beneath his head was a pool of

blood. This point was 675 feet west of the Goodwin tank, between the main track and a spur track, which is nine feet north of the main track there. He was facing west; his feet were six or eight inches from the ends of the cross ties of the main track and his head three or four feet from the ends of the ties of the spur track.

Record, pp. 146, 147, 161, 162.

The surface of the ground where the body lay and between that point and the tank was perfectly smooth and there were no rocks of any kind near the body. The ends of the cross ties and surface of the ground were carefully examined and no evidences of blood could be found anywhere, except the pool beneath his head, nor was there any evidence of his having been dragged at all. (Record, pp. 96, 97, 146, 163.)

The engineer who discovered him said:

"I looked with a torch to see if he had been dragged by the car, and I remarked to the conductor that he lay where he fell."

Record, p. 163.

The body was taken by this passenger train to Forrest City and turned over to Messrs. R. S. and A. L. Stevens, undertakers, who prepared same for burial, and it was sent to the widow of deceased, at Memphis, that night.

The undertakers testified that the remains bore evidences of a powerful blow on the chin, which was cut through to the bone, and that the jawbones on each side were completely crushed, and a wound on the left side of the head, and his shirt was quite bloody in front. (Record, p. 14.)

The evidence of Mrs. McDade and the physician who examined the remains when they reached Memphis show that, in addition to the above marks of violence, there was a scalp wound on the forehead, the teeth of deceased were knocked out, there was a very severe bruise on the *left* side of his head, the *left* ear being split and matter oozing out of same.

Record, pp. 16, 18, 19, 20.

There was not a scratch on his nose, nor was either of his arms broken. (Record, pp. 109, 111.)

Deceased entered the employ of plaintiff on June 15, 1900. He did not go to work on the Memphis division of its railroad, which embraced Godwin, Ark., until July 16, 1900, about four weeks before he was killed, and up to the time of his death he had made only eight or nine trips on this division, one-half of which were made in the night time.

Record, pp. 14, 15, 111, 118.

THE CONDITION OF THE WATER TANK APPLIANCES.

The water tank at Goodwin, Ark., is situated on the north side of the railroad, about four and a half feet from the track. At the time of the accident in question, it consisted of a large platform about 12 feet in height, on which was a large wooden tank, circular in shape. Near the south edge of the platform were attached two heavy upright beams, with a cross beam near the top of the uprights. To the under side of this cross-beam, near each end thereof, were firmly attached two iron pulleys, over which ran two chains, which were connected with a large galvanized iron spout near the center thereof; to the other ends of said chains there were attached two heavy iron weights, which rested on the platform when the spout was not in actual use. This spout was 14 inches in diameter at the lower end and about 10 inches in diameter at the upper end, which was of a goose-neck shape. Around the central part of this spout was a band, to which the chains above referred to were attached on the upper side, and to the under side of said band was attached a chain about the size of a trace chain, which, with the ring at the end, was 23 inches long. The lower end of this spout rested on what is known as the supply pipe, which is about 12 inches in diameter and extends from the tank to a point a little beyond the south end of the platform. When it is desired to supply an engine with water from this tank, the fireman or engineer takes hold of the 23-inch chain above mentioned, pulls the spout down to a horizontal position, the larger end thereof partially encircling the supply pipe, and thus the water passes from the tank into the tender of the engine. When a sufficient quantity has been taken, the

fireman releases his hold and the weights attached to the ends of the chains connected with the spout are sufficiently heavy to draw it back toward the upright beams, and if these chains are of the right length and the appliances properly constructed, the spout will necessarily be carried back to an almost perpendicular position, when the weights rest on the platform.

HOW THE SPOUT SHOULD HAVE HUNG.

All of the witnesses stated that it was intended that these appliances should be so adjusted that the spout, when not in use, would always clear a car and a person anywhere on top of same.

From the testimony of Conductor Hollowell, we quote the following:

Q. "On account of the different heights in the engines the water spout is pulled in different directions and left frequently in different positions?"

A. "It is always left in the upright position."

Q. "That is, it should be left in the upright position?"

A. "It can't be left any other way."

Q. "And if in proper position and working right, it will go back to the upright position?"

A. "Yes."

Record, pp. 52, 53.

Mr. R. H. Briggs, who has been in the railroad business for half a century and a master mechanic for thirty-eight years, now occupying that position with the Frisco (formerly Kansas City) system, which embraces several railroads, testified as follows in regard to the requirements of standard railway tanks and appliances:

"The spout is suspended on what we term a gallows frame; on the side next to the tank two chains run from the gallows frame over pulleys with a weight at one end and a spout at the other. The weights are sufficient to pull the spout back to a vertical position when not in use." (Record, p. 64.)

Further questioned:

Q. "You say that they are intended and constructed—the tank, water tanks—so that the spouts should be in a vertical position when not in use?"

A. "So that it will clear everything."

Q. "And what do you mean by everything?"

A. "Everything in the way of a car or a person on top."

Record, pp. 65, 72, 73, 74, 75

A. "If the spout does not go to the vertical position it shows that the chains are too long." (Record, p. 67.)

Further quoting:

Q. "Mr. Briggs, if the band to which the chains are attached are in proper position with reference to the spout, and the chains are of the right length, will the spout go back automatically?"

A. "It has to go back to a vertical position; it can't help it."

Q. "And the weights, are they to pull it back to that position?"

A. "Yes, sir."

Q. "Wouldn't make any difference how a fireman would leave it, if the appliances are in proper order it would go back to the proper position?"

A. "Yes, sir; of its own accord." (Record, p. 67.)

He also testified that if the slant of the spout was as much as 2 feet 8 inches in a length of 9 feet it would indicate that the chain was too long. (Record, pp. 67, 68.)

And further, that spouts on different tanks are intended to clear any car, with a brakeman sitting on the side thereof. And that he has frequently seen persons sitting on the same side of the car as the tank, passing these tanks of standard variety, without harm. (Record, pp. 72, 73, 74, 75.

W. D. Kennedy, brakeman in the employ of plaintiff in error, testified that the spout is supposed to hang so as to clear a man on the car. (Record, pp. 87, 88, 89, 90.)

R. B. Herring, an engineer on the Kansas City, Memphis and Birmingham railroad, introduced as a witness by plaintiff in error, testified on cross-examination as follows:

Q. "How do they (meaning the spouts) hang with reference to the cars? They are intended to clear the cars all right, are they not?"

A. "Yes, sir."

Q. "To clear the car if anyone is sitting on the side of it?"

A. "Yes, sir."

Q. "If they don't hang high enough above the edge of the car when the brakeman is sitting on the side, they don't hang in the correct or proper position?"

A. "I have never seen one but what did."

Q. "All you have seen hung high enough above the edge of the cars to clear a man?"

A. "Yes, sir."

Q. "It is known that brakemen are bound to be on top of the cars, is it not?"

A. "Yes, sir."

Q. "That is their duty and they ride sitting on the side of the cars, and all the tanks you have ever observed on any other road hang sufficiently high above the highest car that is used in a train to clear it and a man sitting on the side?"

A. "Yes, sir; when they are in proper condition."

Q. "They have two weights attached to two chains attached to a pulley?"

A. "Yes, sir."

Q. "When the chains are of proper length and the weights are sufficiently heavy, when the fireman gets through, it goes back up nearly straight?"

A. "Yes, sir."

Record, pp. 121, 122.

To the same effect is the testimony of W. W. Sherwood and Robert Church, both employes of the plaintiff in error.

Record, pp. 147, 148, 152.

F. A. Luce, general superintendent of the water service of the defendant railroad company, and who had charge of the repairs of water tanks at the time deceased was killed, testified as follows:

Q. "You said there was an ordinary standard. I am asking you for the ordinary construction in your well managed railroads."

A. "The weights are designed to carry those spouts back away from the cars."

Q. "And they ordinarily are constructed so as to be entirely free from any danger of contact with the cars?"

A. "Yes, sir."

Q. "That is the way they are used ordinarily on all roads, so that when not in use they clear the car and the brakeman riding on it?"

A. "Yes, sir."

Q. "The brakemen are supposed to ride either standing or sitting on the edge of the car?"

A. "It depends on circumstances."

Q. "They do do that?"

A. "Yes, sir."

Q. "And they are so construed that a brakeman sitting on the side of the car—that the sway pipe will swing back so it will clear the car with a person on it?"

A. "Yes, sir."

Record, pp. 138, 139, 140, 142.

From the testimony of J. P. Pool, foreman of bridges and buildings, we take the following excerpts:

Q. "How high should the pipe you speak of hang immediately over the eaves? That is, drop a line perpendicular or draw a line from the end of the eaves of the car straight up to where it would strike the pipe?"

A. "*I would consider it standard if it cleared all cars four feet.*"

Q. "And unless it did, it would not conform to what you would consider a standard pipe and tank? That is, your idea of how it should be constructed?"

A. "Four feet on a perpendicular line above the eaves of the car to the pipe." (Record, p. 170.)

HOW THE SPOUT REALLY HUNG ON ACCOUNT OF UNSUITABLE APPLIANCES.

Let us now see how far the actual condition of the spout and appliances, on the night of the accident, differed from what it should have been in order to be up to the standard of safety established by the undisputed testimony.

Conductor Hollowell testified on this point, that one had to be careful to keep out of the way of the spout at Goodwin tank.

Record, pp. 44, 45.

Further questioned:

Q. "And the iron water spout on the tank at Goodwin at this time would come probably within 18 inches or 2 feet of the top edge of a furniture car?"

A. "Yes, sir."

Q. "What is the average height of a person sitting on the edge of a car; an average man?"

A. "An average man on a car ought to be 2½ feet."

Record, p. 52.

According to the evidence, deceased was 6 feet 1 inch in height, and when sitting on a car his chin would be two to three feet above the top of the car. (Record, pp. 17, 52, 88, 89.

W. D. Kennedy, brakeman, testified that when sitting on the side of an *ordinary* freight car, this spout at Goodwin tank would miss his head 6 to 20 inches. (Record, pp. 90, 91, 92.)

He further said: "This tank (meaning spout) will

clear a man on an ordinary car, and on a furniture car he would have to look out for the chains hanging down. I don't know that it would hit a man or not." (Record, p. 87.)

A furniture car is 18 inches to 2 feet higher than the ordinary freight car. (Record, p. 42.)

W. J. Jordan, a resident of Goodwin, testified, that before the accident this spout hung 2½ to 3 feet above the edge of a freight car passing under it. (Record, p. 26.)

Robert Church, engineer, testified that the spout on the night of the accident cleared the eaves of the cab of his engine a couple of feet; that the eaves of his cab were 13 feet from the rail. (Record, pp. 153, 159, 160.)

It is agreed that the eaves of the furniture car on which the lantern of deceased was found, were between 13 and 14 feet in height. A man 6 feet tall, sitting on the eaves of this furniture car, must, therefore have been struck by this spout, according to the testimony of the engineer. This physical fact can be established to a mathematical certainty.

Mr. G. P. Walker, a reliable merchant at Goodwin, a wholly disinterested witness, stated that for some time prior to August 18, 1900, the spout in question hung at a very considerable angle. (Record, pp. 78, 79, 94, 95.)

That two weeks after the accident, before any change had been made in the tank or its appliances, in company with and at the request of the assistant claim agent of plaintiff in error, he made certain measurements at this tank, as follows:

Height of supply pipe above ground, 12 feet; distance to center of nearest rail from the lower end of a line dropped perpendicularly to the ground from the neck of the supply pipe, 4 feet 3 inches. (Record, pp. 77, 78, 79.)

This distance, according to defendant's evidence, was 4 feet 6½ inches. (Record, p. 166.)

Distance to center of nearest rail from point on ground which would be the terminus of a line dropped perpendicularly to ground from higher end of spout, when in its

usual position with chains taut and weights resting on platform, 4½ inches.

According to defendant's evidence, this measurement was 6 inches. (Record, pp. 77, 78, 79, 129, 130.)

In order to be safe, this distance should be at least 15 inches.

Record, p. 176.

The spout was 14 inches in diameter at the lower end and 10 inches in diameter at the upper end, and was 9 feet long; but one witness for defendant stated that it was 8 feet 10 inches long. (Record, pp. 128, 129, 167.)

Now, taking the figures most favorably to, and submitted by the defendant company, and we have a spout 8 feet 10 inches long, of the diameter above specified, resting on a supply pipe 12 feet in height, the distance to the nearest rail from bottom of a perpendicular line dropped from the edge of the supply pipe being 4 feet 6½ inches, and the distance from the bottom of a line dropped perpendicularly to the ground from the top of the spout when in its natural position, not in use, 6 inches. This would necessarily fix the exact angle of the spout, which would be such as to cause the central part of said spout to hang not more than 2 feet 2 inches immediately above the eaves of a car of the size and dimensions of the furniture car on which deceased was riding at the time he was injured, namely: a car whose height to the eaves was between 13 and 14 feet, whose width, inside measurement, was 9 feet. A car of this width would project 2 feet 4 inches beyond the rails, the eaves extend 4 inches beyond the sides, and the sides being about 2 inches thick, would make the width of the car from eave to eave 10 feet. (Record, pp. 170, 171, 179, 181.)

The height of the rails above the ground is at least 6 inches. Now, take a car 13 feet in height to the eaves, which is the lowest limit specified in the agreement as to the dimensions of the car, a person sitting on the north side of such a car when passing by this tank would necessarily be struck by the spout, the central portion of which would come at least six inches below the top of his head. This is not speculation, but a demonstration.

REPLY TO ASSIGNMENTS OF ERROR.

I.

The first error assigned is, that the court erred in affirming the action of the circuit court in refusing to grant the request of defendant below for a peremptory instruction to the jury in its favor. This assignment is based upon four propositions, namely:

1. That there was not sufficient evidence to go to the jury on the question as to whether the deceased was killed by coming in contact with the spout connected with the Goodwin tank.

2. That there was no negligence in the construction and maintenance of the water tank and appliances.

3. That deceased assumed the risk.

4. That deceased was guilty of contributory negligence.

In answer to the first proposition, it is hardly necessary to do more than refer to the testimony above quoted. There was ample evidence tending to show that when the train passed the Goodwin tank the deceased was sitting on the north side of the furniture car on which his lighted lantern was found, and the iron spout on the tank at Goodwin at this time was hanging at such an angle toward the train as *necessarily* to strike the left side of the head of deceased when sitting on the side of this car and facing north. The character of his injuries clearly indicates that he received a powerful blow from some blunt instrument on the *left* side of his head, the fact that he fell, as it were, in a heap, on a smooth surface; that there was no evidence of his having struck a cross tie, or of his having been dragged; that neither of his arms were broken, which would reasonably have occurred if he had fallen from the car while conscious, in view of the natural effort which would have been made to protect himself by throwing out his arms; the improbability that the combination of traumatic injuries which he received could have been produced by his simply falling from the moving train; the improbability that he would have fallen from the train while he was sitting, as the evidence tends to show he was, right by

the hand-hold, or grab-iron, by means of which he could have saved himself from such an accident—all these, and other circumstances in the record, tend to establish with reasonable certainty that the deceased was struck by some blunt instrument as he was sitting on top of the car, in the discharge of his duty, as the train passed by this tank at Goodwin; and, as this iron spout suspended from this tank was unquestionably the only thing in a position to strike him at that time, the jury was fully justified in so finding. The fact that his body was found 675 feet west of the tank in no way weakens the force of this conclusion. Sitting, as the evidence tends to show he was, near the west end of the furniture car facing north, the iron spout would have struck him on the left side of his head and would naturally have knocked him back on the car toward the east, and the vibration of the car would have caused his lifeless body to roll off. This train was running between 20 and 25 miles per hour, and at this rate of speed it required only about 19 seconds to go 675 feet. It is certainly reasonable to suppose that this short time would have elapsed before the body of the deceased, after having been knocked back on the car by the blow from the spout, would have fallen from the car on account of the natural vibration of the fast-moving train.

It certainly cannot be said that fair-minded men could not have reached the conclusion which the jury arrived at in this case. Under the instructions given by the circuit court, the jury would certainly not have done the defendant the injustice of basing a verdict upon mere conjecture, or of finding liability against it, "where the probabilities were as easily reconcilable with freedom from fault as the contrary."

The circuit court charged the jury as follows: "If, after weighing the whole testimony, you find that it is equally probable that the deceased was killed by falling from the train without any agency from the spout and chain in his taking off, plaintiff cannot recover; that is to say, if the proof is so equally balanced that you cannot determine whether McDade was killed through any contributory agency of the spout or chain, the plaintiff cannot recover." (Record, pp. 185, 186.)

This was emphasized in defendant's special instruc-

tion No. 1 A, given by the circuit court in charge to the jury. (Record, p. 190.)

The court fairly summarized the facts in the opinion delivered by Judge Lurton, and the record fully supports the conclusion contained in the following excerpt:

> "While it cannot be said the evidence demonstrates that the deceased was caused to fall from his post by reason of a waterspout at Goodwin, yet, the facts and circumstances pointing to that conclusion were quite sufficient to justify a verdict based upon such an assumption. We have reached this conclusion from an attentive examination of the evidence, and are content to state this result, without burdening this opinion with the details, or an argument based on facts of interest only to the particular litigants here concerned. So far as the motion for an instruction to find for the plaintiff in error was based upon the supposed insufficiency of the evidence in respect to the operativeness of the waterspout as a proximate factor in causing the death of the deceased, it was rightly denied."

See Opinion of Court, Record, p. 232.

NEGLIGENCE IN THE CONSTRUCTION AND MAINTENANCE OF WATER TANK APPLIANCES.

As to the second proposition on which counsel for plaintiff in error relies, we think the proof is absolutely conclusive that the defendant was guilty of negligence in the matter of the construction and maintenance of the spout and appliances at the Goodwin tank. The testimony is undisputed that all of these spouts are intended to clear a brakeman anywhere on top of a car of any height that may be carried by the railroad company in any of its trains. Defendant, according to the testimony of its own witnesses, knew that in order to make this spout and appliances reasonably safe and up to the standard adopted by all railroads, the spout should clear all cars immediately above the eaves at least four feet. (Record, pp. 169, 170, 175 and 176.

The evidence established, almost beyond reasonable doubt, that at the time deceased was killed this spout was hanging so dangerously near to passing trains, as to be within striking distance of a brakeman, who was in the discharge of his duty, sitting on the north side of one of a certain type of cars frequently carried by defendant in its trains. Proper inspection by the railroad company would have caused this danger to be ascertained and removed. All that was necessary was to shorten the chains which connected with the spout at one end and with the weights at the other; or the same result could have been accomplished by elevating the cross beam through which the pulleys, over which these chains run, were attached. This method was adopted after the accident. It was gross and culpable negligence in the railroad company to subject its employes to a risk so great and so absolutely unnecessary, while faithfully discharging the duties imposed on them and indulging the belief, as they had a right to do, that no danger was to be apprehended by them from these spouts, which were supposed to hang, as the proof shows, in such a position as to be free from peril to brakemen on top of the trains. In this connection, we also refer to the eleventh assignment of error, which is based upon the following excerpt from the Circuit Court's charge to the jury:

> "But if you find from the evidence that his death was caused by a collision with the overhanging water spout, either by a blow sufficient of itself to kill him, or by being dazed and disconcerted by a blow from the spout or the down-hanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damages as are given by the statute of Arkansas which has been read in your hearing."

This portion of the charge was modified by the following clause, which was really a part of the instruction above quoted, and without which the above cannot be fairly considered:

> "*Unless* you further find from the evidence in the case, that McDade either knew of the danger of collision with the water spout or chain, or by the observ-

ance of ordinary care while working for the road, or by such care on this particular occasion, might have known of the danger. In that event, his widow and children could not recover, for it would be his own fault not to protect himself against the danger."

Record, p. 185.

As applicable to the concrete case, we think the first portion of this charge, which constitutes the basis of the eleventh assignment of error, is entirely correct. If the defendant railroad company permitted this spout to hang at such an angle as to strike and kill one of its employes, when in the discharge of his duty as brakeman, and when in the exercise of ordinary care, Could reasonable, fair-minded men differ as to whether or not this constituted negligence on the part of the railroad company, especially when it was shown by the undisputed testimony that such a danger was unnecessary and could have been removed by the mere process of shortening the chains by which the spout was suspended? How easy it would have been for the defendant to have ascertained and removed this needless peril, and failing to do so, it was certainly guilty of such negligence as evinced a disregard of the safety of those who operated its trains, and especially of the brakemen, whose duty required them to be on top of trains when passing through stations and who had nothing whatever to do with the handling or using of the water tank appliances.

"Where the evidence is so conclusive against defendant on the question of its negligence, that the jury could not reasonably find to the contrary, the court may so instruct them, leaving them to determine the plaintiff's negligence where the evidence is conflicting."

Delaware, L. & W. R. R. Co. vs. Converse, 139 U. S., 469.

The court is sutained, both by reason and authority, in disposing of the second proposition, as follows:

"2. In respect to the question of the negligence of the railroad company the court instructed the jury in regard to the maintenance of a water-spout in such a situation as to be liable to strike brakemen in the discharge of their duty, 'that it is negligence of itself

for a railroad to so construct such appliances as that we have before us that they will injure the brakemen at work upon its trains.'

"This was excepted to and has been assigned as error. Many requests for charges involving the duty of the employer to the employe in respect to safety of appliances and places for work were also refused, not because they were not law in the abstract, but because inconsistent with the instruction in respect to the peculiar case which had been already given. If, upon all the facts and circumstances in evidence, the jury could not reasonably have come to any other conclusion but that it was negligence to maintain a waterspout in such proximity to the track as to endanger employes, whose duty required them to be on top of passing trains, the court was justified in the peremptory instruction given, and it was not error to either give the instruction we have set out or to refuse those which dealt with the question in the abstract.

"Railroading is an occupation essentially dangerous, and the general principle is, that railroad employes undertake all the risks of the employment which are usually incident to the occupation.

"But such employes do not assume the risk of the negligence of the company itself. Among the duties which devolve upon the company is that of exercising ordinary care in furnishing its employes with proper road-bed, track and other structures and appliances upon which and with which the service required may be rendered. In the discharge of this general duty the master must not expose his servants when in the performance of their duty to perils or hazards against which they may be guarded by the exercise of ordinary care and diligence upon the part of the master. These principles are so well settled as to only need statement. Union Pacific Railroad vs. O'Brien, 161 U. S., 451; Hough vs. Railway Company, 100 U. S., 213; Reed vs. Stockmeyer, 20 C. C. A., 383; Clow & Sons vs. Boltz, 34 C. C. A., 550; Felton vs. Bullard, 37 C. C. A., 1; Mason & O. Ry. Co. vs. Yockey, 43 C. C. A., 228.

"In Reed vs. Stockmeyer, cited above, the Seventh

Circuit Court of Appeals, speaking by Circuit Judge Jenkins, said:

"'So, also, it is the duty of the master to provide a reasonably safe place in which the servant may perform his work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that of themselves are necessarily dangerous, in connection with which no position can be made secure. In such case the law requires of the master that he shall use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the perfomance of like hazardous service, so that the servant exercising proper care, may render his service without exposure to dangers that are not within the obvious scope of the employment as usually carried on.'

"The conclusive evidence was that such swinging spouts should be so constructed as to clear cars without endangering employes in the discharge of their duties on the roof of passing trains. To do this it was, perhaps, not always necessary or customary that the spouts should, when not pulled down, hang in a position absolutely vertical to the tank. But on all of the evidence, it was made to appear most conclusively that they should not be placed in such close proximity to the track, or hang, when not in use, at such an angle as to endanger employes in the proper discharge of their duties on the top of passing trains.

"It may be that the evidence was conflicting as to whether this particular spout was a peril to brakemen on top of cars of the usual height. But it was in evidence that cars built to carry furniture are somewhat higher above the track and somewhat wider than ordinary freight cars, and that such cars were well known in the traffic and frequently found in the trains on this railroad.

"The evidence clearly established that neither

necessity or convenience required that such spouts should be so constructed as to constitute a dangerous obstruction to employes on any cars known to the traffic. Judge Hammond, who tried the case in the circuit court, upon this subject, summed up the law very tersely by saying to the jury, in justification of his instruction, that:

" 'It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience, so free of any consideration of skill, except that of the foot-rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence.'

"It was the duty of the company to use ordinary care to see that the dangers incident to the employment were not unnecessarily enlarged, and the servant thereby exposed to perils which could have been guarded against by the exercise of that degree of care due to employes. The unusual and unnecessary projection of buildings, posts, cattle-guards, etc., over a track, or so near as to endanger employes in the discharge of their duties, has been generally regarded as negligence. Dorsey vs. The Construction Company, 42 Wis. 583; Colf vs. Chicago, etc., Rd., Co., 87 Wis. 273; Missouri Pac. R. Co. vs. Somers, 78 Texas 439; Geo. Pac. R. Co. vs. Davis, 92 Ala. 300; Scanlon vs. Boston A. R. Co., 147 Mass., 484; Chicago & Iowa Rd. Co. vs. Russell, 91 Ill. 298; 5th Ed. Sherman & Redfield's Law of Negligence, Section 201.

"If it had appeared that there was a uniform custom on well-managed railroads to construct such swinging water-spouts in such proximity to passing cars as to endanger employes standing or sitting on the roof of such cars while in the discharge of their duty, no legal imputation of negligence would, perhaps, arise from such a construction, however unnecessary such dangerous proximity might be.

"But we are not called upon to decide such a question, for the conclusive evidence in this case was that neither necessity nor convenience required the main-

tenance of such spouts in dangerous proximity to passing cars, and that there was no such custom or usage on well-managed railroads as would justify un unnecessarily dangerous projection of the kind in question.

"There was, on the evidence in this case, no error in instructing the jury that if the deceased was struck by the tank spout at Goodwin while on the roof of a passing car, that the fact would convict the company of negligence."

Opinion of Court (Record, pp. 232 to 234.)

If the jury found that deceased was killed by coming in contact with this spout, while in the discharge of his duty, could reasonable men differ, under the facts and circumstances of this case, as to whether the construction or maintenance of the said spout and appliances in such an unnecessarily dangerous position, would constitute negligence for which the company would be liable, unless the deceased had assumed the risk arising therefrom, or was guilty of contributory negligence? And on the question of assumed risk, the circuit court went further in its charge in favor of the plaintiff in error than the law warranted. In addition to the clause above quoted, the circuit court charged the jury that if the deceased knew of the danger at the time, "*or might have known it, if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident*," plaintiffs could not recover. (Record, pp. 185, 186.)

The same proposition was reiterated and made even stronger in defendant's special instructions Nos. 6, 7, 10, 11, 14 and 15, all of which were given by the court in the charge to the jury. Special request No. 11 is as follows:

"If you believe from the evidence that a person of McDade's experience and opportunities for observation should, by the exercise of ordinary care, have foreseen that the use of the Goodwin tank, as it existed before his death, would or could have been reasonably expected to have resulted in injury to a person situated as he was situated, upon the night of the accident, then the plaintiff cannot recover." (Record, p. 195.)

Special request No. 14 is as follows:

"The defendant had a right to expect, and it was the duty of McDade that he would use reasonable care to examine his surroundings and all of those appliances of the road, from which, by the use of ordinary care, he should have known might have endangered his safety, and the defendant has a right to rely upon the probability that anyone would know what was generally to be seen of his *own observation.*" (*Record*, p. 195.)

In charging the jury in accordance with these requests, the Circuit Court was more favorable to plaintiff in error than the law justified.

In the case of Texas Pacific Ry. Co. vs. Archibald, 170 U. S., 665, the Supreme Court of the United States clearly stated the principles which are controlling in the case at bar. The railway company assigned error on the refusal of the trial court to give the second and third requested charges, which were as follows:

"If you believe that the defendant company has car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was coupling when he was injured had been brought from the Cotton Belt road to be loaded with oil and returned to said road, and if the plaintiff knew *or by the exercise of ordinary care could have known* that it was the custom of the defendant company not to inspect cars that were brought in, as they were to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover.

"It appears in this case that plaintiff was injured while coupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of the defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom *or could have known it by the ex-*

ercise of ordinary care, then he assumed the risk of being injured by any defect in said car, and cannot recover."

In regard thereto, Justice White, delivering the opinion of the court, said:

"These requests the court gave, except in the *first it omitted the words therein italicized, that is*, 'by the exercise of ordinary care could have known,' and the second, 'or could have known it by the exercise of ordinary care.' The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employe has a right to rely upon the duty being performed, and that while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employe with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employe receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for and no authority exists supporting the contention that an employe, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risk of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. The employer on the one hand may rely on the fact that his employe assumes the risks usually incident to the employment. The employe on the other hand has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordi-

nary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employe is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which where an appliance is furnished an employe, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such appliance, if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages the employe may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and while this does not justify an employe in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances.

"In Missouri Pacific Railway vs. Lehmberg, 75 Tex., 61, 67, the court considered a refusal to give a requested construction, that if there were any patent defects in the engine or tank and deceased knew, or might by ordinary diligence have known of same, and said defects caused or contributed to the injuries complained of, the jury should find for defendants. The court said:

"'Without now considering the question whether the rule in this respect charges an employe with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with

knowledge of such only as are open to his observation. Beyond that, he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances.'

"Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employe to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employe know, or by diligence could have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just sated the trial court not only did not err in striking out parts of the instructions which were asked, but the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by the true legal principles." (170 U. S., 665, 671-674.)

In the case of Gusman et al. vs. the R. R. Co. (La., 1897), 11 A. & E. R. R. Cas. (new series), 643, deceased, a brakeman, was killed by coming in contact with a beam of an overhead bridge, which it was claimed was too low to permit a brakeman standing erect on a box car to pass beneath it in safety. The only allegation of negligence on behalf of the defendant was having the beam so near the top of the cars. In was contended by defendants, that in the allegations of the petition no cause of action was disclosed, for the reason that it was one of the assumed risks of decedent's employment, he having knowledge of the height of said beam and its position. The Supreme Court of Louisiana reversed the lower court, which sustained defendant's exception to the petition, and announced the following to be the law applicable to the case on the authority of Shear. and R. Neg. (4 Ed.), Sec. 198; Beach Contributory Neg., Sec. 134; and Patt. Ry. Acc. Law, Sec. 289: '(1) That an overhead beam across the track of a railway company, which is too low for a brakeman to pass beneath while standing upon the top of the car is an essentially mur-

derous contrivance; and its maintenance, especially after it has become useless, is gross negligence; (2) the risk of injury from such an obstruction is not assumed by an employe, where the dangerous apparatus was under the control of the employer, who could easily have removed it and whose duty it was to have done so. * * * While the proposition, that it is not negligence in a railroad company to construct, or permit to be constructed, overhanging bridges, etc., over its tracks so low as not to permit a brakeman to stand upright on top of a box car, might be true in some special case, under exceptional circumstances, it is certainly not true as a general proposition. On the other hand, were it true, that if the brakeman knew, or was presumed to know of the existence of such construction, he would be held as a general rule to have assumed the risk of injury therefrom, it is not true that the fact of such knowledge carries with it necessarily and on all occasions and under all circumstances, the cutting off of the remedy for injuries received by him from such construction.' "

In the case of the Chicago & A. R. Co. vs. Stephens (Supreme Court of Ill., Feb. 20, 1901), 59 N. E., 577; s. c. 20 Am. & Eng. R. R. Cas. (new series), 182, the court in its opinion stated the facts to be as follows:

"The undoubted evidence is that at the place of injury, about half a mile north of Tallula Station, a coal chute had been maintained on the east side of defendant's track for about six years. The main part of the structure was 28½ inches east of the ladders of passing freight trains; but there was a footboard attached thereto some 7 feet from the ground, extending toward the track, which was 12 inches wide, the outer edge being only 16½ inches from such ladders. Some of the witnesses called this a 'running board' and others a 'foot board,' it being used for the employes of the coal company to stand upon in operating the chute to deliver coal to the engines of the defendant, and there is no evidence tending to prove that the trainmen had any connection whatever with operating the coal chute. At the time of the accident the deceased was descending a ladder in the ordinary and usual manner

and was struck about the hips by the projecting board above described and thrown from the ladder to the ground, receiving injuries which resulted in his death. That these facts fairly tend to show that the structure was so near to the railroad track as to render it dangerous to those operating freight trains in the usual and ordinary manner, cannot, we think, be seriously questioned. In fact, we are at a loss to perceive how, under the proof in this record, it can be said that the evidence does not fairly establish that fact. The accident itself certainly tends to prove it. The burden of the argument of the counsel for the appellant is upon the question, whether the evidence proves, or fairly tends to prove, the other material allegations of the declaration, that the deceased was himself, at the time he received his injury, in the exercise of due care. He had been in the service of the defendant company as a head brakeman on freight trains twenty-eight days and had made several trips passing the coal chute where he was injured, his train stopping at this place, as is contended by the defendant, often to coal. In the forenoon of August 30, 1897, the conductor of the train, on the platform at Tallula Station, after the train was in motion going northward, gave him a message to be delivered to the engineer to stop the train at Five Points, the next station, about 2½ miles north, for the purpose of unloading a car of cinders. He at once climbed to the top of the rear car and went forward to the front of it, where he attempted to descend the ladder in order to reach a flat car next to the box car between him and the engineer, where he was struck as above stated. There was offered in evidence a rule of the company which counsel for appellant insists made it the duty of employes of the company operating freight trains to descend ladders on the opposite side of the box car being at the rear end, and, of course, so removed from the flat car that the latter could not be reached by it. We do not understand counsel to claim that the deceased was not, at the time of his injury, in the performance of duty in attempting to obey the order of the conductor, or that he was not in the exercise of ordinary care in so doing, except in that he descended the ladder at a time when he was liable to come

in contact with the coal chute; but the position is that he knew, or was charged with knowledge of the fact, that to descend the car when opposite the structure was dangerous. It is true that the evidence shows, that immediately before descending the ladder he recognized and waived his hand to a young lady near the track, or, as appellant claims, he himself admits that he was fooling with a girl. While that testimony might tend to show that he was not giving attention to his duty or that he was negligent in that regard, it certainly could not be claimed, and we do not understand that it is contended, that that fact would, as a matter of law, establish negligence. * * * If it be conceded that there was evidence before the jury in this case from which they might reasonably have found that the deceased knew, or ought to have known the dangerous proximity of the structure to the ladders upon freight cars, still it cannot, from that evidence, be said that he was chargeable with such negligence as a matter of law. The length of time he had been in the service of the company, the number of times he had passed the place, the number of times his train had stopped there for the purpose of taking coal, and the rule of the company, were all facts and circumstances tending to charge him with the knowledge. The fact that he was in the performance of his duty, which required promptness in reaching the engineer, the facilities afforded him for accomplishing that purpose, the nature of his duties as a brakeman, the fact that he had nothing to do with the use of the coal chute in taking the coal when trains stopped there for that purpose, were facts and circumstances properly to be considered by the jury, tending to prove that he did not know and was not chargeable with any knowledge of the danger. It is impossible for us to say, upon all this evidence, that he was or was not so chargeable. That was the province of the jury in the first instance, subject only to the review by the appellate court. The judgment of the appellate court will be affirmed."

The same doctrine is announced in Ry. Co. vs. Woodruff, 66 Ga., 707; Brown vs. N. Y. C. & H. R. R. Co. (N. Y. 1901), 60 N. E. 1107.

In Chicago, etc., R. R. Co. vs. Russell, 91 Ill., 298 it was held to be culpable negligence on the part of the railroad to permit a telegraph pole to stand for three years so near the track that it was within 18 inches of passing freight trains. The switchman, who is charged with making up trains, was injured by striking a switch stand within 9 or 10 inches of the train when moving on the track. Held, that the risk of injury arising from such cause was not assumed by the switchman. Pidcock vs. Union Pacific R. R., 5 Utah, 612; s. c. 1 L. R. A., 131.

An employe does not assume the risk arising from the erection and maintenance of a switch stand and target of such height and in such position and condition that the target will sometimes come in contact with the sides of the cars of passing trains; particularly when such employe of the company knows that the rules of the company prohibit the erection of any such switch stand within less than 6 feet of the track. (Boss vs. Northern Pacific R. R. Co., 2 N. Dak., 128; 49 N. W., 265.)

In the case of the Houston & Texas Ry. Co. vs. Oram, 49 Tex., 241, plaintiff, 'who was a brakeman and baggage master on the Houston & Texas Central Ry. Co., while attending to his duties as brakeman and ascending a side ladder of a car, was knocked off by a projection from over a water tank belonging to the company. The tank was closer than usual to the road; the frame work not far enough from the side of the car to allow a man to ascend the car with safety. It was Oram's duty to be at the brake at the stopping place and not to await the signals. He was going to his place in obeyance of the signal, in haste. The engineer did not check the speed of the train, which was moving from 12 to 14 miles per hour.' * * * There were ladders on each side and end of the cars; the injury would not have happened had Oram gone by any of the other ladders. The court said: 'That the company is responsible if the injury was caused by the improper construction of the road, tank, or cars, without any carelessness or negligence on the part of the plaintiff, is not contested. The law is believed to be

settled, that it is the duty of the railroad company to use ordinary care to provide such cars, roadbed, tanks, etc., as are reasonably safe; that a failure to do this is negligence charged on the company itself; and that the company is responsible in damages to an employe for an injury resulting, without his negligence, from a tank or other appendage to the road so negligently constructed as to subject the employe to an unnecessary and extraordinary danger which he would not reasonably anticipate or know of, and of which he in fact was not informed.' "

The Circuit Court charged fully on the subject of contributory negligence. (Record, pp. 185, 186.)

Under the facts of this case, the jury were warranted in finding that the death of deceased was caused solely by the negligence of the defendant.

The dangers which needlessly imperil human life and which can be removed at little cost, are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the railroad to remove and, as long as the needless peril is maintained, the employer is guilty of culpable negligence. The testimony in this case clearly shows that the deceased, at the time the train passed the Goodwin tank, was in the discharge of his duties, which compelled him to be on top of the cars to receive and transmit signals and when necessary to operate the brake. That the orders which had been given him by the conductor at Forrest City to deliver to the engineer, to go ahead of another train at Brinkley, and the fact that another passenger train was following close in the rear of said freight train when it passed Goodwin, made him unusually attentive to his duties, the proper discharge of which required constant and unremitting application of all his faculties. It was necessary for him to keep his eyes on the conductor or rear brakeman and be ready to receive and transmit signals to the engineer. His duty and the safety of the train demanded this.

Where a railroad company erected cattle chutes so near its track that a brakeman, while on the ladder of a box car, was struck by one of the chutes, the Supreme Court of Wisconsin, speaking by Chief Justice Ryan, said:

"If a uniform custom of railroad companies to use structures unnecessarily dangerous to persons employed in operating trains had been proved, we should hesitate gravely before holding that the custom could excuse the danger. A positive acquiescence, *scienter*, of one so employed, might, indeed, take away his right of action for injury incurred by such a structure. But there is a public, as well as private, interest. The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate, the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the State concerned in the welfare of its citizens. And no custom, however uniform or universal, which unnecessarily exposes railroad employes to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters. We use the word 'unnecessary' advisedly, distinguishing 'necessity' from 'convenience.' A convenience may be so great as to be regarded as a practical necessity. But a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle chutes to the track as to jeopardize life and limb of persons operating trains."

Dorsey vs. Construction Co., 42 Wis., 583.

In the same case the court said:

"The safety of railroad trains depends largely upon the exclusive attention of those operating them to the track, and to the trains themselves. It is not for the interest of railroad companies, or of the public—with like, if not equal, concern in the safety of trains—that persons so employed should be charged with any duty or necessity to divert their attention. And it appears to us very doubtful whether persons operating railroad trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. And even with actual notice of the

dangerous proximity of adjacent objects, it may well be doubted whether it would be reasonable to expect them, while engaged in their duties, to retain constantly in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects. In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention from their duty on the train to their own safety in performing it."

The case at bar is stronger than the case last cited, for in that the brakeman, at the time he was killed, was not in the discharge of any duty which was calculated to absorb all his faculties. He was simply ascending or descending the ladder which led from the top of the box car Furthermore, in the case at bar, there is absolutely no proof that the deceased had any knowledge that the spout in question was hanging at such an angle as to be dangerous to a person on top of any of the cars used in defendant's train, nor was there any proof whatever that he had ever passed this tank while on top of a furniture car before the night he was killed, or that he knew that being on top of such car while passing said tank was at all dangerous.

In reference to the defense of contributory negligence, which was certainly not established by any proof, it should be observed, that where the injury results in instant death, as in this case, "the law, out of regard to the instinct of self-preservation, presumes that the deceased was at the time in the exercise of due care, and this presumption is not overthrown by the mere fact of injury. The burden rests upon the defendant to rebut this presumption." (Flynn vs. R. R. Co., 78 Mo., 195, 212.)

Even if the deceased had actually known that this spout was hanging in a dangerous position, but forgot this fact while absorbed in the discharge of his duties, it would still be for the jury to say whether, under all the circumstances, he was guilty of contributory negligence. On this point, we refer to the case of Mason & O. R. R. Co. vs. Yockey, 43 C. C. A., 228, in which Judge Day, delivering the opinion of the court, said:

"The only contributory negligence that could fairly be ascribed to him would be failing to observe the formation of ice upon the apron and stepping thereon. We think it was in the province of the jury to decide this question, in view of the engrossing nature of the fireman's duty, constantly repuiring his attention in its proper discharge."

The law will not permit a railroad company needlessly to erect and maintain structures that inflict on its employes the penalty of death for a "momentary thoughtlessness." It will be observed that the penalty is inflicted for a supposed momentary forgetfulness of himself and his own safety, not for a momentary forgetfulness of his duties and the safety of the train. Momentary thoughtlessness, however, is not proved in this case, but only assumed by the defendant as probable; but contributory negligence is never to be assumed or presumed. In the case of Southern Ry. Co. vs. Duvall (in the Court of Appeals of Kentucky, 1900), 56 S. W., 988, where the head brakeman was killed by coming in contact with an overhead bridge, the court said:

"But it is earnestly contended for appellant, that the decedent was guilty of such contributory negligence as to bar the right to recover. This contention has nothing to support it, except the fact that decedent must, of necessity, have known that the foreign car was higher than the others; hence it is argued that he should not have been on the car when the train went under the bridge. It is also suggested that there was no necessity for him to have been on the car at that time. It nowhere appears that his attention had been called to the car in question, which, in fact, had been put in the train for the first time that evening and night, and there is nothing to show that he knew that standing upon said car when passing under said bridge was dangerous to his life. It would be a harsh rule, indeed, that would require a brakeman to know the exact height of a foreign car placed in the train shortly before it started on its usual trip. It is also evident that a brakeman is not guilty of contributory negligence by simply remaining on top of the car, and the evidence in this case tends to show, that a few

minutes before the bridge was reached, it was necessary for him to be on top of some of the cars to adjust brakes."

See also Mexican Central Ry. Co. vs. Eckmann, 42 C. C. A., 344; Wood vs. L. & N. R. R Co., 11 Am. & Eng. R. R. Cas. (new series), 325.

The court was not in error in stating that:

"The questions of assumption of risk and of contributory negligence were properly left to the jury under a charge quite as favorable as the plaintiff in error could demand. Valley Ry. Co. vs. Keegan, 31 C. C. A., 255; Union Pacific Ry. Co. vs. O'Brien, 161 U. S., 451."

II.

It is next assigned as error that the court sustained the action of the Circuit Court in admitting over the objection of plaintiff in error certain testimony of Mrs. McDade as to the amount of wages the deceased was earning at the time of his death. We submit that this assignment is not well taken.

Under the statutes of Arkansas, in which State this cause of action arose, the measure of damages to be allowed the widow and next of kin is what the jury may "deem a fair and just compensation with reference to the pecuniary injuries resulting from the death" of the husband or father; and, according to the construction of the statute by the Supreme Court of Arkansas, "this compensation is to be determined by taking into consideration the age, health, habits, occupation, mental and physican capacity for and disposition to labor, and the probable increase or dimunition of that ability with the lapse of time; deceased's earning power, *rate of wages*, and the care and attention which one of his disposition and character may be expected to give to his family—all these are proper elements for the consideration of the jury in determining the value of the life taken." (53 Ark., 117.)

This testimony, as well as some other not objected to, tended to show that the deceased was earining $70 to $75

per month, practically all of which was spent on his wife and children, who were entirely dependent on him for support.

Record, pp. 15, 182, 183.

III.

The third assignment of error embraces six sub-assignments, based on six different exceptions to various portions of the testimony of C. A. Hollowell. It probably should not be considered at all, because in violation of Rule 11, adopted by the court. Each assignment should embrace a single exception.

> Clark vs. Deere & Mansur Co., 80 Fed., 534; U. S. *ex rel.* Coquard vs. Indian Grave Drainage Dist., 85 Fed., 928.

An examination of the record will show that certain parts of the testimony quoted in this assignment were not objected to at all, and only the most general objections were taken to any part of it. In no instance was any specific ground of objection stated.

1. In regard to the testimony cited under the first sub-assignment, p. 61 of brief, we submit that no error was committed by the court in admitting this. The witness was clearly giving his best impression in regard to the position of deceased at the time that he was giving the signals as the train was passing through Goodwin, and when he stated that he judged of this by the position of deceased's lamp and signals, he was clearly speaking of the lamp at the time the signal was given, not of its position as he saw it subsequently on the car. Only a general objection was made by defendant to the first question, and none to the answer above, and the question was certainly competent. (Record, p. 61.)

Besides, the same witness testified positively that he was looking at the deceased when he gave these signals, and that he was sitting on the right-hand side of the car. This portion of his testimony was not objected to. (Record, p. 42.)

2. It is next claimed that the court erred in admitting the following questions and answers:

Q. "How long had the tank been in the condition it was in the night that this train passed by?"

A. "As far as I know, ever since I have passed there."

Q. "State whether or not you ever made any observations of it personally?"

A. "Nothing, only to be careful to be out of the way of it."

Q. "You had to be careful to be out of the way of it, did you?"

A. "Yes, sir." (Record, p. 45.)

We think this evidence is competent as tending to show the position of the spout with reference to passing trains. Defendant could certainly not complain of this, in view of other testimony of its own witnesses, which showed that the spout hung within striking distance of a person on some of the cars carried in its trains.

3. The next sub-assignment of error relates to the admission of the following testimony:

Q. "State what is the usual custom of head brakemen on your road and others in regard to their position on the top of the car when passing stations."

A. "Well, there is no special position at all. They use their own pleasure in regard to that."

Q. "What custom, if any, exists with regard to sitting on the side of the car?"

A. "That is the customary position always of a person riding on top."

Q. "Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?"

A. "Well, I will answer that he was in the discharge of his duties."

Q. "He was, at the last time you saw him, in the proper discharge of his duties?"

A. "Yes, on top of the train, looking after the train."

The answer to the first question above quoted contained nothing of which the defendant could complain. It was entirely innocuous. The second question to which exception is now taken, was not objected to by defendant below. Not even a general objection was urged thereto.

Record, pp. 46, 62, 63.

Nor was the third question objected to. The record shows that the portion of the answer to the above question, which states that McDade was in the discharge of his duties, was objected to in a very general way, no specific ground of objection being stated. We think it was competent to show, that at the time the train was going into Goodwin, deceased was in the discharge of his duties as head brakeman. The last question quoted above and the answer thereto, on which so much stress is laid by the learned counsel for plaintiff in error in their brief (pp. 66 to 72), was not objected to at all, and hence the plaintiff in error is not in a position now to complain thereof. It will be noticed that the witnesses at no time stated, *over the objection of defendant*, that the deceased was in the *proper* discharge of his duties; neither was he asked for, nor did he give, an opinion, that a particular manner of performing such services was required of him in the discharge of his duties. This is the distinction recognized in the cases relied on by counsel, and we do not think that any part of the testimony, to which any legal objection was made by the defendant, contains the vice now attributed to it.

4. It is next claimed that the Circuit Court erred in admitting, over the objection of the defendant below, the following questions and answers:

Q. "State what his character was with reference to his efficiency or inefficiency, carelessness or prudence."

A. "He was always very careful in handling trains, doing work or anything of that kind."

In regard to this sub-assignment learned counsel for plaintiff in error state in their brief, at page 72 as follows:

> "The court allowed proof of the general reputation and character of the deceased with regard to carefulness and prudence to be considered by the jury, in determining whether deceased exercised due care at the time of the acicdent, which issue was one sharply drawn and earnestly debated."

This is exactly what the court did *not* do. When the above question was asked defendant below made a general objection thereto and the record shows the following ruling in regard thereto:

> "Judge Hammond—'The question is admitted as to his general reputation as a brakeman as to the estimate of damages, but for the purpose of showing whether on this particular occasion he was careless or careful in his habits, it is excluded.'" To the ruling of the court *plaintiff* excepted. (Record, p. 63.)

It will thus be seen that six pages of the elaborate brief (pp. 73 to 78) of the learned counsel for plaintiff in error, are devoted to a general objection made to the above testimony, which was sustained by the Circuit Court.

The testimony embraced in the fifth and sixth sub-assignments to which only a general objection was made by the defendant below was of a harmless nature, and substantially the same fact which it tends to establish was proven by other witnesses, without objection from the defendant below.

Besides, it should be remembered, in view of the fact that deceased met his death at night, while in the discharge of his duty on one of defendant's trains, it became necessary for plaintiffs to take the depositions of Conductor Hollowell and Rear Brakeman Kennedy, though still in the employ of the company. They should therefore be regarded, to some extent, at least, in the nature of adverse or unwilling witnesses, and a little more latitude allowed in their examination, in order to develop the real facts surrounding the death of deceased.

IV.

This assignment embraces three different exceptions, which involve distinct propositions. The first sub-assign ment contains five questions and answers of the witness Briggs, which it is insisted were admitted over the objection of the defendant below, but the record shows that only the last question and answer quoted on pages 80-81 of brief for plaintiff in error was objected to, and that only in a general way. This question and answer were unquestionably competent, as were also the preceding, which were not objected to. (Record, p. 65.)

On the same page of the brief is the following statement:

> "Again the witness (Briggs) admits that he was not familiar with the custom generally on well regulated roads throughout the United States, with regard to the construction of water tanks, but merely testifies what the construction of such tanks was upon the Kansas City system."

In reply to this, we quote the following from his testimony:

> Q. "Does your experience in railroad business, covering a period of 50 years, give you familiarity with the construction of water tanks sufficiently to enable you to testify as to what is the proper structure and what is the standard adopted by *various* railroads?"
>
> A. "I should say so myself." (Record, p. 65.)

It is shown, moreover, that he had been a master mechanic 38 years, and during the last ten years had had control of the water service on the Kansas City system. (Record, pp. 64, 66.)

2. In regard to the testimony quoted under this sub assignment, it is proper to say that the record shows that only a general objection was made to the first question, and that question was not answered, and no objection whatever was made to the other questions and answers quoted on page 81-82 of brief.

See Record, p. 66.

3. Only a general objection was made to any part of the testimony embraced in this specification and the witnesses testified substantially to the same fact elsewhere, without any objection whatever. (Record, pp. 67, 68, 72, 73.)

Apart, however, from the character of the objection made, we do not think the testimony of this witness is subject to the criticism made against it. He was an expert, entirely familiar with standard water tanks and appliances, and the method of constructing and maintaining them, and it was certainly competent to inquire of him how they should be constructed in order to be up to the standard adopted by railroads generally, and what kind of appliances were used in order to keep the spout in the right position, and the condition of such appliances when the spout hung otherwise than in a practicly vertical position when not in use. From the opinion of the court in the case of Hutchinson Cooperage Co. vs. Snyder (Circuit Ct. of Ap., 7th Circuit), 107 Fed. Rep,, 633, we quote the following:

> "The court permitted witnesses to testify that a machine like a model put in evidence was impracticable and dangerous. This, it was objected, was an invasion of the province of the jury. When, however, the subject is one concerning which an expert's testimony is proper, it is not a good ground of objection, that the opinion of a witness embraces the point to be decided by the jury. Transportation Line vs. Hope, 95 U. S., 269-279. And when the inquiry is, whether a machine is properly constructed, or is suitable for the use to which it is put, whether it can be operated without danger, or in what respects it will be dangerous to the one operating it, there can be no doubt that the testimony of experts will ordinarily be competent."

Citing a number of authorities.

V.

Only a general objection was made to the question and answer quoted in this specification, and apart from this

fact, we think the question was entirely competent, and, if this particular answer was evasive or indefinite, it is immaterial in view of other statements made by the witness, clearly showing that he actually saw the signal given by the deceased with his lantern, which, according to witness' best impression, was given on the side of the car. (Record, p. 84.)

Besides, this fact was established by plaintiff in error's engineer, Robert Church. (Record, pp. 149, 150.)

VI.-VII.

These assignments of error are based upon the admission of certain testimony of Drs. Smythe and Webb, set out on pages 87 to 89 of brief. The record shows that general objections were taken to only portions of this testimony; it should further be noted that neither of said witnesses were permitted to testify as to what produced the death of the deceased. (Record, p. 103.)

They simply testified as to the character of the instruments which would produce such injuries and whether or not all of the injuries received by the deceased could reasonably have been produced by a single blow. In reply to a question, Dr. Smythe said: "I am not supposed to answer whether the pipe did it or the ground did it." (Record, p. 106.)

The answer to the last question on page 87 of brief, now complained of, was certainly not injurious to the defendant, and, if error it contained, was of a harmless nature; and so with the answer to the first question on page 88 of brief.

The third specification on page 88 contains questions and answers which were not objected to at all by defendant below.

Record, pp. 105, 106.

Dr. Webb had personally examined the body of deceased and was familiar with the injuries which he had received, and it was certainly competent, therefore, for him to say whether such injuries as he had himself witnessed on the person of deceased could have been produced

by a single blow, or whether more than one blow was necessary. Besides, to the first question contained in specification 7, only a general objection was made. It was not answered in the manner shown on page 89 of brief. (Record, p. 109.) And the subsequent questions and answers set forth on said page 89 of brief, under this assignment, were not objected to at all. (Record, p. 110.)

VIII.-X.

These assignments of error are based on admissions of certain testimony brought out on the cross-examination of Frank Sayers and G. P. Pool, witnesses for the defendant, in regard to changes which were shown by these witnesses to have been made in the water tank appliances about two weeks after the accident. These changes consisted simply in elevating the cross beam, to which were attached pulleys, over which ran the chains connected with the spout at one end and with heavy weights at the other, which weights rested on the platform. The elevation of this cross beam had the same effect as shortening the chains and thus causing the spout to be pulled back to a nearly vertical position and making it clear the cars and any person on them. It should be noted that the fact of some change being made in these appliances subsequent to the accident was first developed by counsel for defendant in cross-examination of one of plaintiff's witnesses, W. J. Jordan, who was shown a photograph of said tank at Goodwin and asked whether or not it was a correct representation of the condition of said tank and appliances at the time of the accident, and when the witness replied that it was not, that the appliances had been changed since deceased was killed, counsel for defendant, over the objection of plaintiff, withdrew the photograph and declined to permit the jury to examine it.

Record, pp. 31, 32.

Besides, these very witnesses, Sayers and Pool, were introduced by the defendant for the purpose of showing the condition of said tank and appliances and giving certain measurements made by them, after the accident, and, in order to strengthen their testimony, they had been asked

on direct examination if any change whatever in the tank appliances had been made at the time these measurements were taken.

Record, pp. 126, 166.

Moreover, that the spout at this tank hung at such an angle as not to be dangerous to persons on passing trains.

The Circuit Court several times ruled out testimony tending to show changes made in these appliances after the accident, until it became absolutely necessary to show what this change was, in order to ascertain the actual condition of things at the time of the accident. In view of the testimony presented by defendant in regard to these measurements, which were made after the accident, plaintiffs were certainly entitled to show, that when the measurements were made, the appliances were not in the same condition as on the night of the accident, and to show what these changes were in order to arrive at the true condition of the appliances at the time deceased was injured. The testimony was expressly restricted by the court to this purpose. (Record, pp. 132, 134, 140, 141, 172, 173.)

In addition to the rulings of the Circuit Court, thus restricting this testimony, at the time it was admitted, the attention of the jury was especially called thereto in the following excerpt from the charge:

> "I shall not comment on the proof, because it is not necessary; but, as a precautionary warning, it is best to repeat what was said by the court so often during the progress of the trial, that you must not imply anything against the defendant company by reason of the fact that after this accident they made a reconstruction of these water tank appliances. The court kept that fact out of the proof as long as possible. But, in trying to decide the conflict of testimony about measurements by feet and inches, it became necessary to take notice of this change, in order to understand the value of the proof as to measurements. The fact of the change has no other bearing on the issue of this case than that; and, for the reason so often explained to you, you should give the fact no other force than that which is necessary for the explanation of distances."

Record, p. 186.

There are a number of well recognized exceptions to the general rule, that evidence of subsequent precautions and repairs is not admissible; as, for instance, where it directly tends to show conditions existing at the time of the injuries, or is in rebuttal of the testimony of defendant's witnesses or properly drawn out in their cross examination.

Wat. Damages for Per. Inj., p. 769.
Shinners vs. Proprietors of Locks & Canals, 154 Mass., 168, 171.
Christian vs. Minneapolis, 69 Minn., 53.
L. E., etc., R. R. Co. vs. Middlecoff, 150 Ill., 27.
Louisville, etc., R. Co. vs. Malone, 109 Ala., 509.

By elevating the cross beams three inches, the chains connecting the spout and weights were, in effect, shortened six inches, and the spout pulled back toward the tank to this extent, which would diminish the angle and cause the spout to hang about one foot higher immediateely over the eaves of the car than it did before the change was made. This evidence not only threw light upon the condition of these appliances at the time of the accident, but tended to rebut the evidence of the defendant, that at that time the spout and appliances conformed to the standard on well regulated railroads, and, as insisted on page 19 of counsels' brief, that it was necessary that the spout should hang in the position which characterized it at the time of the accident; "otherwise it would be most inconvenient, if not impossible, for the fireman or engineer to pull the spout down by the small chain attached thereto so as to put it in service."

If it was in the right position and conformed to the best standard, at the time of the accident, Why was this important change made two weeks later? Moreover, this evidence tended to show that it was entirely unnecessary for the spout to hang in the position it did at the time of the accident; for, so far as the proof shows, it served the purpose of the railroad company just as well after it was elevated as before.

This evidence also shows how easily defendant could have removed the deadly peril which lurked in this spout

and appliances, to brakemen in the discharge of their duty on its trains, at and before the time of the accident. It has been held that a witness who has testified to the proper condition of machinery at the time of an accident, may properly be asked to explain why, if this were true, repairs were made soon thereafter.

Brevier vs. Delaware, etc., Canal Co., 13 Hun. (N. Y.), 254.

"So, where it was alleged by the plaintiff and confirmed by his witnesses, that there was a depression in a railroad track at a particular point at the juncture of two rails, which was denied by defendant's witnesses and evidence was offered that shortly after the injury the defendant's workmen raised the point in question up to a level, such evidence was held competent."

Wat. Per. Inj., p. 770.
Kuhn vs. Wisconsin, etc., R. R. Co., 76 Ia., 67.

For the purpose of showing that an obstruction in the street was unnecessary, it has been held proper to show its removal after the accident.

Dillon vs. Raleigh, 124 N. C., 184.

The Circuit Court, however, as before stated, would not permit the jury to consider this evidence for any purpose other than as tending to show the actual condition of the appliances at the time of the accident.

Opinion of Court, Record, p. 234.

IX.

This assignment is based upon the action of the Circuit Court in sustaining the objection of plaintiffs to a question asked a witness of plaintiff in error, which called for his opinion as to whether deceased, after being struck by the spout, would have fallen off of the car before the train had gone 675 feet.This question was manifestly incompetent. Besides, the Record does not show what the answer of the witness would have been, and therefore no error can be predicated on this ruling of the Circuit Court.

ASSIGNMENTS XII. TO XXVII.

We deem it unnecessary to notice the remaining fifteen assignments of error, which are based upon refusals to instruct the jury as requested. In each instance, the exception to the Circuit Court's refusal to instruct the jury in accordance with said fifteen special requests was general. It will be found that each of these requests, not covered by the general charge, included propositions which were clearly unsound and, under such circumstances, the exception was insufficient to compel a re-examination in this court.

The Record shows that eight of the special instructions requested by plaintiff in error were given by the court.

Record, pp. 190-198.

An examination of these special requests and of the general charge will show that the Circuit Court stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles.

The deceased, at the time of his death, was only 27 years of age, in robust health, with an expectancy of thirty-six years. He was considered a first-class brakeman of excellent habits and high character, earning between $70 and $75 per month, with prospects of promotion. While at his post of duty he met his death, solely as the result of the inexcusable negligence of the defendant railroad company, which he had a right to assume would safeguard him against unnecessary dangers. He left a widow and three small children, who had been entirely dependent upon him for the material benefits and blessings of life. Under all the circumstances of this case, a verdict of five thousand dollars ($5,000) was one of which defendant should not complain. The court committed no error in affirming the judgment of the Circuit Court.

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